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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROCHELLE JOYCE ASCHER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the Virginia courts apply the presumption in civil securities law created by the Supreme Court in *Reves v. Ernst & Young*, 494 U.S. 56, 110 S.Ct. 945 (1990)—that every loan is a "security"—and make this a mandatory presumption in a criminal prosecution involving political loans and alleged securities fraud?

2. May the Virginia courts withdraw as an element of the crime of securities fraud the "knowledge" that the notes "sold" were "securities" in contradiction of the express language found in the securities statute requiring that the conduct be done "knowingly," as well as similar language found in the prosecution's bill of particulars?

3. May the Virginia courts withdraw an element of the crimes charged, and otherwise confound a jury by instructing them that if the accused participated in any way in the "sale" of a "security," she was liable for conspiracy and for intent to commit securities fraud whether or not she contemplated such crimes beforehand?

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III. REFERENCE

Ascher v. Commonwealth, 12 Va.App. 1105, 408 S.E.2d 906 (1991)

IV. JURISDICTIONAL STATEMENT[1]

A. INSTRUCTIONS AND DECISION SOUGHT TO BE REVIEWED

The Virginia Court of Appeals upheld Petitioner's securities fraud conviction entered on June 19, 1991 (App. 35a *et seq.*)[2] in a reported opinion filed on August 31, 1991, *Ascher v. Commonwealth*, 12 Va.App. 1105, 408 S.E.2d 906 (1991) (App. 1a *et seq.*), deciding:

> (a) that there is a mandatory presumption in a securities fraud prosecution that every "note"—even one involving a political loan—is a "security" (App. 17a-25a), citing in support this Court's decision in *Reves v. Ernst & Young*, 494 U.S. 56, 110 S.Ct. 945 (1990), a civil securities suit decided by this Court ten months *after* Petitioner's state conviction; and
>
> (b) that the trial court may instruct a jury that, if the accused participated in any way in the "sale" of a "security," she is liable for conspiracy and for intent to commit securities fraud whether or not she contemplated the commission of these crimes beforehand (App. 25a-27a, 104a).

The Virginia Court of Appeals also refused to permit an appeal on whether Petitioner had to "know" that these

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[1] The Commonwealth of Virginia is represented in this matter by the Honorable John Russell, Senior Assistant Attorney General, Office of the Attorney General of Virginia, 101 North Eighth Street, Richmond, Virginia 23219.

[2] References to the Appendix shall be hereafter referred to as "App. 00a"; references to the Appendix in the state court shall be "Va. App. 00."

"notes" were securities (App. 98a, 33a). The Supreme Court of Virginia then refused to permit her an appeal (App. 29a).

B. STATUTORY PROVISIONS CONFERRING JURISDICTION

This Court's jurisdiction is invoked in accordance with Title 28, United States Code, Section 1257 as this petition is concerned with the rights, privileges, and immunities set up and claimed by Petitioner in the Virginia trial court and preserved on appeal under the Due Process Clause of the Fourteenth Amendment, by which Clause it is denied to the diverse states any power to deprive an accused of liberty unless the prosecution proves beyond a reasonable doubt every element of a charged offense.

In accordance with Rule 10.1 (Considerations Governing Review on Writ of Certiorari) of the Rules of the Supreme Court of the United States, Petitioner respectfully suggests as further grounds that:

(a) the Virginia Court of Appeals' decision at issue here addresses an important question of federal law (the mandatory presumption that every note is a security in a criminal prosecution, purportedly in accord with this Court's decision in *Reves*), a question not yet settled by this Court.

(b) the Arizona state court decision, *State v. Tober*, 826 P. 2d 1199, 96 Ariz. Adv. Rep. 91 (Ariz. App. 1991), holding that a state securities prosecution that considered every note a security and found it unnecessary for the accused to know the notes were securities violated constitutional due process, a decision that plainly conflicts with the Virginia Court of Appeals's decision at issue here.

(c) the Virginia Court of Appeals' decision decided a federal question by withholding from the jury's consideration the elements of the crimes charged against the accused in conflict with applicable decisions of this Court.

C. REHEARINGS DENIED

The Court of Appeals denied Petitioner's request for a rehearing *en banc* on October 17, 1991 (App. 65a). The Supreme Court of Virginia denied Petitioner's request for an appeal on March 12, 1992 (App. 29a). The Supreme Court of Virginia denied Petitioner's request for a rehearing *en banc* on April 17, 1992, within 90 days of the filing of the instant petition.

V. CONSTITUTIONAL PROVISIONS, TREATIES, ETC.[3]

Virginia Code Sections 13.1-501, 13.1-502, 13.1-504, 13.1-507, 13.1-520, and 18.2-22
Title 15, United States Code, Sections 77b, and 77x
7B, Uniform Laws Ann., Sections 401, 409
Amendments to the United States Constitution: The First, Fifth, Sixth, and Fourteenth Amendments

VI. STATEMENT OF THE CASE

In February, 1987, Mrs. Rochelle Ascher, Petitioner herein, a fundraiser for political causes associated with political activist Lyndon H. LaRouche, Jr., was charged in eleven (11) counts with securities fraud (App. 67a-72a).

In August 1988, another count, conspiracy to commit securities fraud, was added by the prosecution (App. 66a).

At the conclusion of the three-month trial in April, 1989, the trial court dismissed counts 3, 5, and 6 for lack of venue in Loudoun County, Virginia.

The jury, challenged for its partiality because of the massive pre-trial publicity in opposition to LaRouche and

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[3] In accordance with the Rules of the Supreme Court, the constitutional and statutory provisions have been included in the Appendix.

his associates,[4] found Petitioner guilty on all nine counts they considered, and sentenced Petitioner, a first time offender, to an eighty-six year prison term. The trial court reduced this sentence on June 6, 1989 to ten years confinement in prison (App. 35a-39a).

The Indictment charged that Mrs. Ascher was, in effect, selling "securities" when, in addition to the contributions she solicited, she accepted "notes" or "evidence of indebtedness," that is, loans from LaRouche's supporters dedicated to funding LaRouche's various political undertakings. The prosecution charged her fraud consisted principally of withholding information that the LaRouche political organization was in a sorry financial state (Va. App. 2192, 2231).

In accordance with the state securities statute, Va. Code Ann. § 13.1-520A (App. 281a), the Indictment charged that Mrs. Ascher "*knowingly* and willfully" committed these various securities fraud offenses (App. 67a-72a).[5]

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[4] The trial court changed venue for each of Petitioner's co-defendants, citing the "extreme difficulty" encountered in seating Petitioner's jury, notably that 115 veniremen had to be examined in rural Loudoun County, a community saturated continuously from 1986 through Petitioner's trial in 1989 with prejudicial publicity against resident "political extremist" Lyndon LaRouche and his associates (App. 275a-277a). Petitioner Ascher argued in support of her motion to reduce the jury's sentence in June, 1989 that the prejudicial publicity meriting the transfer of every other case meant her jury was partial as further evidenced by the jury's unprecedented and disproportionate 86-year sentence.

[5] The Indictment charged that Petitioner did "*knowingly* and willfully":

— "offer and sell" unregistered securities (Count One),

— "transact business as an unregistered broker-dealer [for securities]" (Count Two), and

— did repeatedly participate "in the offer and sale of a security" (specifying in separate counts nine loans from seven individuals over a three year period) (Counts Three through Eleven) (App. 67a-72a). (Emphasis Supplied.)

The prosecution's Bill of Particulars further specified Petitioner knew she had to register herself to sell "securities," that is, "promissory notes" and "letters of indebtedness."[6]

Petitioner Ascher argued to the trial court—but was precluded from making the same or similar arguments to the jury—that she did not "know" that these political loans were "securities," much less that she purposefully avoided registering the notes or herself (App. 43a-46a, 58a-59a, 98a).

Petitioner further argued to no avail, in reliance on the prefatory language found in Virginia Code § 13.1-501 (App. 278a), that "the [political] context [in which these loans were made] . . . require[d]" they *not* be considered securities (App. 46a-55a, 57a, 61a-63a, 79a-85a, 105a, 258a). Petitioner cited authority that the purpose of this prefatory language was to confine the broad statutory definitions that followed. *Marine Bank v. Weaver*, 455 U.S. 551, 556, 102 S.Ct. 1220, 1223, 71 L.Ed.2d 409 (1982) (App. 81a). Petitioner invoked the contextual test enunciated in *SEC v. W.J. Howey Co.* 328 U.S. 293, 66 S.Ct. 1100, 1104 (1946)(the *Howey* test) that the political loans at issue were not "securities" *unless* the jury found the lender had "*invest*[*ed*] his money" *and* was "led to expect *profits*." (App. 81a, 82a-84a, and 85a). (Emphasis Supplied.)

It is material to this Petition, particularly because of the panel decision by the Virginia Court of Appeals, that

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[6] The Bill of Particulars provided that "the failure of the defendant [Ascher] to register [as a broker dealer of securities] was *knowing* and willful in that . . . her failure to do so [to register] was an effort to avoid scrutiny and detection by the State Corporation Commission ["S.C.C."] or law enforcement authorities in Virginia and other jurisdictions," and that "the failure to register either the notes [as securities] or the agents selling the notes [as broker dealers] was part of an overall scheme to defraud the purchasers of those notes. . ." (Emphasis Supplied.) *See* Commonwealth's Bill of Particulars, ¶¶ 2 (c) and 2 (d); App. 74a.

both parties adduced evidence at trial that the context of these loans was political and not an investment.

The evidence showed that witness-lenders, in the first instance, became LaRouche supporters following a chance conversation about politics across a card table covered with leaflets, festooned with hand drawn political posters, staffed by a LaRouche supporter, and found at some airport, post office, or shopping center (App. 153a-154a, 159a, 181a-182a, 203a, 207a, and 233a). In this and later conversations, the individual was urged to support LaRouche himself or some controversial political stand or to become politically active (to attend political rallies, lobby elected officials, support LaRouche candidates for elective office, or even to run himself for office) (App. 154a, 160a-162a, 205a, 213a-216a).

The evidence showed that each individual was usually encouraged to subscribe to various publications espousing LaRouche's views, and encouraged to contribute to one or more of the various LaRouche political causes, publication drives, or concededly cash-short entities. If a contribution could not be had, the individual was usually asked to lend money instead for these same politically motivated objectives. (App. 122a, 124a, 127a-128a, 131a, 166a, 186a, 188a, 194a, 198a, 205a-206a, 209a-211a, 216a).

The defense summoned witnesses to testify the funds they loaned were not an investment, nor given with any expectation of receiving a profit; these lenders were indisputably seeking to advance a political agenda; their testimony is summarized in the margins and reproduced in the Appendix.[7]

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[7] A. Dunn, a defense witness, said he loaned the LaRouche organizations money because "they [the LaRouche organizations] needed money and I knew that some money had been . . . taken out of their bank account [by federal authorities];" he loaned the funds at an unprofitably low rate, not knowing whether he would ever get it back,

The prosecution witnesses testified as to the non-investment character of their loans; their relevant testimony is also summarized in the margins and reproduced in the Appendix.[8]

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said he "d[id]n't look at that [loan] as an investment," stating, by way of explanation, that "a political contribution [sic] is notorious for not being [repaid]. . ." (App. 231a, 232a).

J. Hereford, a defense witness, made loans to the LaRouche organization "to help with the cash flow until funds could be recouped from the [government's] seizure [of funds] in Boston," and *not* as an investment (App. 236a-237a).

M. Fairchild, a defense witness, made a loan "to further the efforts of the organization," and "not in the sense of a financial investment," rather as "an investment in the future of America," and he later forgave his loan (App. 238a-239a, Va. App. 1949). S. Gregory, a defense witness, also made his loan "to help out the cause" (App. 258a).

H. Griffith, a defense witness, loaned funds to "support . . . the efforts to continue the strategic defense initiative and the efforts of the Fusion Energy Foundation", and not to make a financial investment, nor any profit for that matter, particularly since the loans he made were interest-free (App. 234a-235a). C. McCarthy, a defense witness, loaned the LaRouche organizations funds at zero percent interest, and later forgave her loans (App. 243a).

G. Eddleston, a defense witness, loaned money "to expand the subscription base and to put Mr. LaRouche on TV during the presidential campaign" and declared it was not a business investment, later forgiving his loans (App. 240a-241a).

R. Watson, a defense witness, "didn't intend to make any money on any of them [his loans]" and didn't consider them investments (App. 247a, 249a). Nor did R. Hull, a defense witness, consider his loan an investment (Va. App. 2002).

[8] Robert N. Ware, a witness for the prosecution, made a loan (Count Four) to the not-for-profit Fusion Energy Foundation to spread LaRouche's political message, and stated he plainly did not consider his loan an investment, "not *per se*." Mr. Ware forgave the outstanding balance due on his loans long before he testified at trial (Va. App. 1823; Tr. 3/9/89, at 149).

L. W. Burchett, the undercover police officer charged with inducing Petitioner Ascher to issue a note for a political loan and thereby engage in a "securities" transaction, swore he was prepared to lend money

Both sides also proffered expert testimony. The defense proffered the expert testimony of George Mason Law Professor Henry Butler that these political loans *were not* securities (App. 254a-255a). The prosecution proffered expert testimony by University of Virginia Law Professor M. T. Dooley that they *were* securities (App. 168a *et seq.*).

(Count Ten) "at a loss" and "as a favor" to the LaRouche organization, conceding it was "not a smart investment" (App. 129a-130a).

Dr. E. G. Allen, another prosecution witness, testified he loaned funds (Count 11) "because [he] supported the political position of the organization" (App. 194a). He conceded the funds he withdrew from his pension funds to make some loans had to "earn" interest lest he jeopardize his tax status, characterizing the interest earned as "nominal" (App. 195a). It was hardly an investment to loan other funds to publish a book called *Dope Inc.* from a bank credit line that cost him precisely the same interest rate he expected in "return" for his LaRouche loan (App. 188a-190a).

M. Cathleene Waddell, another prosecution witness, suffered a stroke and memory loss (aphasia) between making both contributions and loans (Counts 7, 8 and 9) and testifying about them at trial (App. 135a). She could not remember amounts, alternately failed to remember whether she gave or loaned funds, at one time saying she made $50,000 worth of contributions (App. 146a). She did not remember contributing to petitioner's defense fund (App. 149a) or discussing politics (App. 148a). She did, however, remember that she made some loans expecting *no* interest (App. 147a, 151a).

Mr. J. Herndon, a prosecution witness, said he borrowed money from a bank at sixteen percent and loaned it at a loss, at ten percent (App. 132a-134a). Mr. Cotterino, another prosecution witness, said he loaned his money at a loss, for 12% interest when the funds cost him 17%, conceding the loan "wasn't for [his] financial benefit," and made another loan at precisely the same interest rate it cost him to get the funds (App. 219a-220a, 223a-224a). Mr. G. Thompson, another prosecution witness, loaned funds at the same rate it cost him on his credit card to subsidize political television broadcasts (App. 165a-166a). Messrs. Hiatt and Newell, prosecution witnesses both, similarly loaned monies at the same rate charged on their credit cards or at a loss (App. 156a-158a, 212a, 214a-216a). Mr. E. L. Parker, another prosecution witness, said he expected *no* profit from his loan to pay for a political conference (App. 205a-206a). Lelia McMillan, another prosecution witness, made five (5) loans at 0% interest (Commonwealth Exs. W18A-18F).

The trial court, however, stated that the literal definition that a "note" or "evidence of indebtedness" was a security was plainly stated in the Code in Section 13.1-501(j) (App. 178a), and the trial court did not "understand why either side brought a law professor here to tell us what a security is" (App. 256a).

The trial court never appreciated that the context or purpose of the loan or the knowledge of the accused was material or relevant to the jury's deliberations.

The prosecution submitted an instruction containing the literal definition found in the statute (App. 93a); the trial court accepted that instruction. The prosecutor also submitted a "contextual" instruction stating each juror had to "examine the *substance* [not the form] of the transaction" (App. 86a). The prosecution advised the trial court "there is no set definition of what is a promissory note" and "[t]he Supreme Court of the United States has discussed it and evidence of indebtedness is even less subject to a clear definition" (App. 51a). The prosecution proposed the trial court instruct the jury that if "investment was a consideration or factor" in making the loan, then the loan was a "security" (App. 86a, 51a). The trial court, however, refused the instruction saying, "Well, the security is described in the [literal] instruction [App. 93a] that the Court has already granted from the Virginia Code," and "[t]he Code sections that have been the subject of the amended indictment don't talk about *investment* at all. . ." (App. 51a) (emphasis supplied).

Petitioner then argued on behalf of her instruction (App. 79a) that "not every note, nor is every evidence of indebtedness a 'security'," offering examples of the absurdity of such a literal definition (App. 54a), noting Petitioner's proposed instruction was "drawn from the statute when it speaks about [the transaction's] context" (App. 52a-53a), objecting that "just reading a Code section is not enough" (App. 52a), and concluding that both parties had invoked

the same case authority in proposing instructions that required the lender to have an investment motive for the "loan" to be a "security" (App. 53a). The trial court responded to the defense, as it had before to the prosecution, that "the instruction, as it's offered, contradicts the [literal] definition set out in the statute. The definition has already been given from [Section] 13.1 [of the Virginia Code], as one of the instructions considered this morning (App. 93a). I refuse this" (App. 54a).

When Petitioner submitted a legal memorandum (App. 82a-84a), and another proposed instruction (App. 85a, 57a-58a), reviewing the *Howey* test, the Court responded it had reviewed the memorandum and instruction, but refused to give it (App. 58a).

As a result, during summation, when Petitioner's counsel tried to argue that these political loans were not securities, the trial court instructed the jury that, if the instrument was a loan, it was irrelevant "whether it's a loan of a bank or a loan from a particular political party" (App. 62a). The trial court instructed the jury that every loan ("note") was a security (App. 93a).

Petitioner offered a jury instruction, pursuant to Va. Code §13.1-520(A), which required the jury to find Petitioner knew the notes were securities (App. 79a, 43a); the Court refused this instruction (App. 56a-57a). Instead the trial court instructed the jury that "it is *not necessary* that the [prosecution] prove that the defendant *knew* that what she was offering for sale or selling was a security." (App. 98a). The prosecution had conceded its instruction was "not the subject of a great deal of law in Virginia," referring the trial court to Professor Loss's treatise on the Uniform Act; the trial court disregarded the fact that the statutory provision the prosecution referenced did not require knowledge as an essential element (App. 44a, 285a). The prosecution's instruction was given over Petitioner's objection (App. 43a-47a, 58a-59a).

Finally, the trial court instructed the jury that, if defendant participated in any way in the making of any loan (security), and the crime of securities fraud or conspiracy resulted, then the jury could find Petitioner defrauded the lender and conspired to do so "whether such crime [either fraud or conspiracy] was originally contemplated or not" (App. 104a). The trial court said it was troubled how Mrs. Ascher could be held responsible for acts she is charged with "knowingly and wilfully" committing, *see e.g.*, App. 88a, 91a, and perhaps planning beforehand, *see* App. 99a, when the jury is also instructed she need not have "contemplated" the crime at all before its commission.

The Virginia Court of Appeals, *Ascher v. Commonwealth*, 12 Va.App. 1105, 408 S.E.2d 906 (1991) concluded that *Reves v. Ernst & Young*, 494 U.S. 56, 110 S.Ct. 945 (1990), decided *after* Petitioner's trial, established a presumption that all notes were securities, grudgingly conceding that "in other circumstances" such a presumptive instruction "may have been insufficient" but "there is *no context* in which the jury could have found the notes at issue not to have been securities . . ." as "there were *no* facts to support the giving of Ascher's proffered instruction [App. 79a, 81a, and 85a] or a comparable instruction [App. 86a] defining when a promissory note or evidence of indebtedness is not a security" (App. 18a-19a). (Emphasis supplied.)

VII. THE QUESTIONS PRESENTED

1. THE VIRGINIA COURTS IMPERMISSIBLY CREATED A MANDATORY PRESUMPTION THAT EVERY LOAN IS A "SECURITY"

Petitioner was convicted by a jury that was not permitted to consider at least two elements of the securities fraud crimes she was charged with, namely, (1) whether the political loans she made were "securities" (the jury was instructed that all loans were securities), and (2)

whether Petitioner "knew" they were securities (the jury was instructed that it was not necessary that she know).

The prosecution's burden was thereby impermissibly lightened by the trial court below, even as Petitioner adduced evidence to prove that these loans were not securities, and that she did not know they were securities.

The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of a charged offense. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). Jury instructions that relieve state prosecutors of this burden of proof violate a defendant's due process rights. *See Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.ED.2d 39 (1979).

It is a basic tenet of securities law, more recently reaffirmed by this Court in *Reves v. Ernst & Young*, 494 U.S. 56, 110 S.Ct. 945, 950 (1990), that the name ascribed to a financial instrument and the fact that such an instrument is listed in the Code's "definition of a security" is not dispositive of whether the instrument is, in fact, a security:

> ". . . the phrase 'any note' should not be interpreted to mean literally 'any note' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Act."

The substance of the transaction is therefore what is scrutinized, not the form. *United Housing Foundation v. Forman*, 421 U.S. 837, 848, 95 S.Ct. 2051, 2058, 44 L.Ed.2d 621 (1975), *Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 553, 19 L.Ed.2d 564 (1967).

At the time of Petitioner's trial, the test most often applied in Virginia to determine whether a "note" was a

security was the *Howey* test, inquiring whether the instrument involved:

> ". . . a transaction or scheme whereby [1] a person *invests* his money [2] in a common enterprise and [3] is *led to expect profits* [4] solely from the efforts of the promoter or a third party". (Emphasis supplied.) *S.E.C. v W.J. Howey Company*, 328 U.S. 293, 298-299, 66 S.Ct. 1100, 1103, 90 L.Ed.1244 (1946).

If the instrument failed to meet any one of the four elements of the *Howey* test, it was not a security. *See e.g., In Re Epic Mortgage Insurance Litigation*, 701 F. Supp. 1192, 1248 (E.D. Va. 1988).

At the time of Petitioner's trial, the *Howey* test had been followed in the Fourth Circuit encompassing the Commonwealth of Virginia,[9] and the Supreme Court of Virginia had interpreted its state securities statute in accordance with federal case law, *see e.g., Pollock v. Commonwealth*, 217 Va. 411, 229 S.E.2d 858, 860 (1976).

Petitioner therefore proposed two jury instructions (App. 81a, 85a), the last instruction expressly urging the trial court to use the *Howey* test.[10]

There was no question that there were facts that disputed whether these notes were securities. Both defense and prosecution witnesses testified they loaned funds but

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[9] *Lawler v. Gilliam*, 569 F.2d 1283 (4th Cir. 1978); *Epic Mortgage Insurance Litigation*, 701 F. Supp. 1192 (E.D. Va. 1988) (purchase and sale of whole loans and loan participation did not involve securities); *Principe v.McDonald's Corp.*, 463 F. Supp. 1149 (E.D. Va. 1979) (notes that were not negotiable, conferring no voting rights, and which did not appreciate in value were not securities); *Oliver v. Bostetter*, 426 F. Supp. 1082, at 1085 (D. Md. 1977).

[10] The prosecution proposed a jury instruction that required the jury to consider the lender's motives in making these loans (notes) (App. 86a).

these notes failed the first prong of the *Howey* test as the lenders swore they did not consider their loans investments (App. 231a, 232a, 234a-235a, 236a-237a, 238a-239a, 240a-241a, 247a, 249a). One lender explained his loan was not a financial investment but rather "an investment in the future of America" (App. 238a-239a, Va. App. 1949).

At the time of Petitioner's trial, *In Re Epic Mortgage Insurance Litigation*, 701 F. Supp. 1192, 1248 (E.D. Va. 1988), concluded that, when determining whether the instrument was an "investment," the courts considered:

> "[T]he size of the offering; whether it is, by necessity, reliance on the expertise of the issuer; the purpose of the issuer in executing the note and the payee in accepting the notes; and the economic inducements held out to the prospect[;] . . . the degree to which the profit on the notes is in the hands of the maker rather than the payee; whether the object of the holder was to acquire an interest in the property or enterprise; whether the note was primarily commercial because it was serving as a 'cash substitute' for the purchase price; and whether the return on the note was predetermined or could reasonably be anticipated, or was subject to the managerial efforts of the maker. *South Carolina National Bank v. Darmstadter*, 622 F. Supp. 226, 229-230 (D.S.C. 1985) quoting *Futura Development Corp. v. Centex Corp.*, 761 F.2d 33, 41 (1st Cir. 1985), *aff'd*, 813 F.2d 403 (4th Cir. 1986), *cert. denied*, 479 U.S. 1065, 107 S.Ct. 951, 93 L.Ed. 2d 1000 (1987)."

By *Epic*'s definition, these notes were not "investments." Petitioner's "expertise" and "pitch" as a fundraiser was political, and not financial. The lender's "purpose" was also political. As for the "economic inducements," the lenders were informed that these political

organizations operated on a week-to-week budget (App. 246a) and, accordingly, these lenders made their political loans at no rate at all (App. 151a, 234a-235a, 243a, 244a, 247a, 249a; Commonwealth Exs. W18A-18F), at the same rate the funds cost the lender (App. 157a, 165a, 188a-190a, 206a, 212a, 214a-215a, 223a), for a nominal rate (App. 231a, 232a, Va. App. 1705), and even at a loss (App. 129a-130a, 132a, 157a, 212a, 214a-215a, 219a-220a). Rather than assert "an interest" in any LaRouche properties, many lenders forgave their loans instead (App. 238a-239a, 243a, 240a-241a, 244a), saying they considered the loans more like gifts or political donations (App. 231a, 243a).

When the notes had an interest rate, it was predetermined, specific, invariable, and independent of the "success" or "failure" of the LaRouche organizations to receive donations or sell subscriptions. These fixed interest loans failed the second prong of *Howey* since the lender had no expectation of profits as defined in *In Re Epic Mortgage Insurance Litigation*, *supra*, 701 F. Supp., at 1249:

> "Obligations of this sort [notes with a fixed interest rate] do not involve 'profit' for purposes of determining whether the obligations involved are securities. Payments of interest are 'not directly tied to profitability,' *McVay v. Western Plains Service Corp.*, 823 F.2d 1395, 1399 (10th Cir. 1987), since they are not dependent on, and do not vary with, the success of the venture. *See e.g., American Fletcher Mortgage Co. v. U.S. Steel Credit Corp.*, 635 F.2d 1247, 1254 (7th Cir. 1980), *cert. denied*, 451 U.S. 911, 101 S.Ct. 1982, 68 L.Ed. 2d 300 (1981); *National Bank of Commerce of Dallas v. All American Assurance Co.*, 583 F.2d 1295, 1301 (5th Cir. 1978)."[11]

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[11] Nor may the prosecution suggest the lender's profit was derived somehow by the tax deductions lenders received for their forgiven loans

As plainly set forth in "the statement of the case" above, the trial court admitted the evidence that proved these loans were not "securities" but denied Petitioner a contextual instruction by which the defense could argue the evidence to the jury or the jury could consider the evidence. The trial court remained steadfast in its mistaken resolve that it was sufficient to instruct the jury in the language of the statute, the literal definition of security. (App. 93a).

This Court has disapproved the use of any mandatory conclusive presumption not merely because it " 'conflict[s] with the overriding presumption of innocence with which the law endows the accused,' " *Sandstrom v. Montana*, 442 U.S. 510, 523, 99 S.Ct. 2450, 2459, 61 L.Ed.2d 39 (1979)(quoting *Morissette v. United States*, 342 U.S. 246, 275, 72 S.Ct. 240, 256, 96 L.Ed. 288 (1952)), but also because it "'invade[s] [the] fact-finding function' which in a criminal case the law assigns solely to the jury," 442 U.S., at 523, 99 S.Ct., at 2459 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 446, 98 S.Ct. 2864, 2878, 57 L.Ed.2d 854 (1978)). The constitutional right to a jury trial embodies "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155, 88 S.Ct. 1444, 1450, 20 L.Ed.2d 491 (1968). This judgment reflects "a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id.*, at 156, 88 S.Ct., at 1451. Thus, no judge may direct a verdict for the prosecution. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573, 97 S.Ct. 1349, 1355-1356, 51 L.Ed.2d 642 (1977). In *Carpenters v. United States*, 330 U.S. 395, 408-409, 67 S.Ct. 775, 782,

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as this Court has expressly rejected tax advantages as any evidence of income or profits. *United Housing Foundation v. Forman*, 421 U.S. 837, ——, 95 S.Ct. 2051, 2062, 44 L.Ed.2d 621 (1975).

91 L.Ed. 973 (1947), this Court found that "No matter how strong the evidence may be. . .", there had to be an appropriate jury instruction "[f]or a judge may not direct a verdict of guilty no matter how conclusive the evidence." Thus, the "question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Bollenbach v. United States*, 326 U.S. 607, 614, 66 S.Ct. 402, 406, 90 L.Ed. 350 (1946).

On appeal to the Court of Appeals, Petitioner asserted she had been denied her due process rights by the trial court's refusal to render a contextual jury instruction. The Court of Appeals sought to save the trial court's manifest error by compounding it, (*first*), by explicitly establishing a novel mandatory presumption in a securities fraud prosecution that every note is a security in reliance on *Reves* decided *after* Petitioner's conviction (App. 20a), and, (*second*), by mis-stating the trial record to the effect that there were *no* facts adduced at trial to dispute the proposition that these loans were investments anyhow (App. 18a-19a).

This mandatory direction, sanctioned by the Virginia Court of Appeals, foreclosed the jury's consideration of whether the facts adduced at trial did prove every essential element of Petitioner's alleged crimes beyond a reasonable doubt. *Francis v. Franklin*, *supra*, 105 S.Ct., at 1971, explained that "a mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts," such as the existence of a note or evidence of indebtedness, the only predicate facts the trial court required the prosecution to prove. This Court long ago disapproved adjudging guilt by standards that apply in civil cases.[12]

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[12] In *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970), this Court cited approvingly the state court's observations that "a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fair-

The Virginia Court of Appeals did not concern itself that there was no such presumption at the time of Petitioner's trial. In *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 105 S.Ct. 2297, 2306, 85 L.Ed.2d 692 (1985), the harbinger of *Reves*, Justice Powell, albeit in *dicta*, declined to find that "any" note was a security, commenting instead that a "note" was "a *relatively broad term* that encompasse[d] instruments with *widely varying* characteristics, depending on whether issued in a consumer context, as commercial paper, or in some other investment context." (Emphasis supplied.). As the retroactive application of the *Reves* test and its substitution for the *Howey* test affected "the quantity or the degree of proof necessary to establish [petitioner's] guilt," *Hopt v. Utah*, 110 U.S. 574, 589-590, 4 S.Ct. 202, 209-210, 28 L.Ed. 262 (1884), then the Virginia Court of Appeals violated the *ex post facto* clause of the United States Constitution.

Finally, the Virginia Court of Appeals erred when it found that Petitioner had not adduced evidence meriting a contextual instruction under the recent *Reves* decision. *Reves* rejected the *Howey* test as the standard, and adopted a "more promising framework for analysis," namely, that a "note" will *not* be considered a security if: (a) it bears a strong "family resemblance" to any one of certain established categories of non-securities,[13] or (b) it otherwise bears sufficient indicia of a non-security to warrant creation of a new category. *Reves*, 110 S.Ct., at 950-951.

To determine whether the notes made by the LaRouche supporters were securities, one must examine four factors:

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ness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case" (citations omitted).

[13] These categories were originally set forth by the Second Circuit in *Exchange Nat'l Bank v. Touche Ross & Co.*, 544 F.2d 1126, 1137 (2d Cir. 1976), and in *Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930, 939 (2d Cir. 1984).

(1) the motivations that would prompt a reasonable seller and buyer to enter into the transaction; (2) the plan of distribution of the instrument; (3) the reasonable expectations of the public; and (4) the existence of some other factor, such as another regulatory scheme, that renders securities regulations unnecessary. *Reves*, 110 S.Ct., at 951-952.

Under the *Reves* factors, these notes were not securities:[14]

1. *The motivations of the parties to the transaction.* In formulating its first test, this Court drew the traditional distinction between commercial and investment motivations, stating an instrument is more like a security "[i]f the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments *and* the buyer is interested *primarily* in the profit the note is expected to generate. . ." (Emphasis Supplied). *Id.*, 110 S.Ct., at 951-952.[15] The trial witnesses repeatedly indicated they were not "primarily" interested in profits. They were "primarily" interested in politics, in advancing various causes. The Virginia Court of Appeals' decision overlooked any of the lenders' trial testimony evidencing the fact that they were *not* "primarily" motivated to make a profit, indeed many were guaranteed by the express terms of the notes they signed that they would receive *no* interest, or *no* net return, or could expect a *loss* (since

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[14] Cases since *Reves* have concluded that an instrument will be deemed not a security where even two of the four *Reves* factors so indicate. *Premier Microwave Corp. v. Comtech Telecommunications Corp.*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,789 (S.D.N.Y. Jan. 28, 1991)(Wood, J.); *Iacobucci v. Universal Bank*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,075 (S.D.N.Y. Jan. 28, 1991) (Keenan, J.).

[15] *Reves* therefore directly contradicted the prosecution's proposed contextual instruction in the trial court below that investment need not be a "primary" factor (App. 86a).

the lender borrowed the funds to make the loan at a higher rate—usually on his credit card—than the rate he requested the LaRouche organizations pay in return). Moreover, the Virginia Court of Appeals found that "interest" terms on the notes were synonymous with "profit" rather than simply a factor to be considered in determining motive (App. 22a, n. 6 and accompanying text), overlooking again that the interest at issue in *Reves* "was an interest rate constantly revised to keep it slightly above the rate paid by local banks and savings and loans," *Reves*, 110 S.Ct., at 953, and the rate at issue in Petitioner's case was fixed and, as noted in the discussion of the *Howey* test above, not related to the success of the LaRouche organizations donation or subscription drives.[16]

This Court also specifically found in *Reves* that if a note or loan is made "to correct for the seller's cash-flow difficulties . . . the note is less sensibly described as a 'security'", *Reves v. Ernst & Young*, *supra*, 110 S.Ct., at 952, and trial witnesses testified they loaned their monies to cover funds taken from the LaRouche organizations until the organizations could recoup their losses (App. 231a, 232a, 236a-237a).

2. *The plan of distribution.* A note is likely to be a security if "it is an instrument in which there is 'common trading for *speculation* or *investment*' ", *Reves v. Ernst & Young*, *supra*, 110 S.Ct., at 952. In *Reves*, notes were offered in a "large scale offering" to 23,000 "unsophis-

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[16] The Court of Appeals' rhetorical grasp exceeded the reach of the evidence when it mis-stated the record, saying that Dr. Allen's pension funds required him to make a "profit" (App. 23a), rather than merely to receive "interest" on any withdrawal from his pension fund, doing so without particular regard for Dr. Allen's individual motivation. Dr. E. G. Allen testified he loaned funds (Count 11) "because [he] supported the political position of the organization" (App. 194a), and conceded the funds he withdrew from his pension funds to make some of the loans had to "earn" interest lest he jeopardize his tax status, characterizing the interest earned as "nominal" (Va. App. 1705).

ticated members of the public" and sold to over 1,600 such persons. 110 S.Ct., at 953-954. This Court therefore concluded in *Reves* that the notes were "offered and sold to a broad segment of the public, and that is all that we have held to be necessary to establish the requisite trading." 110 S.Ct., at 953. This Court underscored it did not have to find the instruments were traded on any exchange. By contrast, in this case, the loans were not advertised to the general public, and were not "traded" in the sense apparently intended by *Reves*. These notes were neither transferable nor negotiable. Although there were some 2,000 notes issued from 1984 through 1986, the notes were negotiated individually with persons who had already expressed support for LaRouche and for the causes he espoused as evidenced variously by the lender's conversations at road-side card tables, by way of political action, after subscribing to various LaRouche publications, and making one or more contributions. The notes such a lender made thereafter was but another form of political commitment. The loans did not evidence financial speculation or investment. Nor was it crucial in the circumstances of this case that some individual lenders were unsophisticated, or that other lenders were very sophisticated. As discussed previously, these notes were simple transactions; they did not involve a variable interest rate or terms, and were neither transferable nor negotiable once made.

3. *The reasonable expectation of the investing public.* The third *Reves* factor requires an examination of the reasonable expectations of the investing *public*, *Reves v. Ernst & Young*, *supra*., 110 S.Ct., at 952. The "general public" was not, however, included in these loan solicitations. If this is in fact the purport of the language, "public," in *Reves*, then perhaps we may conclude on this point here. But, if it may be argued that the language, "investing public," should be read more narrowly to include those LaRouche supporters who deigned to loan funds, it is not reasonable to expect that any lender appreciated that these

notes were, or could be considered, securities. Each instrument on its face purported to be a note, or evidence of indebtedness, and *not* a security. Neither Petitioner nor any witness testified they believed these notes to be securities. Further, if it is the "reasonable" expectations of the individual LaRouche supporters *qua* "the investing public" that we must consider, it appears unreasonable that, given the lender's initial card-table contacts, the lender's discussions about political issues, political action, subscriptions to propaganda-laden publications, and donations to these same political causes, that any lender expected or appreciated that the purpose of the loan that followed upon such goings on was a business opportunity, rather than another political undertaking in a consistent course of political action, albeit of a different financial hue than a political contribution. In this context, the term "investment" was understood to mean a "political investment" when bandied about.[17] In this regard, it is pertinent that this Court stated that, when applying this third prong, the fact-finder should consider "countervailing factors that would have led a reasonable person to question" the characterization the loans were investments. *Reves v. Ernst & Young, supra*, 110 S.Ct., at 953.

4. *The existence of another regulatory scheme or other risk-reducing factor making application of the securities law unnecessary.* Applying the fourth *Reves* test, whether there is another regulatory scheme that significantly reduces the risk of the instrument, rendering application of the state securities code unnecessary, *Reves v. Ernst & Young, supra*, 110 S.Ct., at 952, Petitioner submits this test is obviously satisfied in the Commonwealth of Virginia

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[17] By analogy, the Tenth Circuit has rejected any relationship between the lay term "investment" found in sales literature promoting loan participations and a "security," and held: "[t]he participation agreement was no more an investment [in the legal sense] than a loan . . . directly to the borrower would have been." *McVay v. Western Plains Serv. Corp.*, 823 F.2d 1395, 1399 n. 5 (10th Cir. 1987).

by the existence of its general fraud or false pretense statute.[18]

2. THE VIRGINIA COURTS MAY NOT WITHDRAW AS AN ELEMENT OF THE CRIME OF SECURITIES FRAUD THE "KNOWLEDGE" THAT THE NOTES SOLD WERE "SECURITIES" IN CONTRADICTION OF THE EXPRESS LANGUAGE FOUND IN THE SECURITIES STATUTE REQUIRING THAT THE CONDUCT BE DONE "KNOWINGLY," AND IN THE PROSECUTION'S BILL OF PARTICULARS

The felony provision, Va. Code Ann. § 13.1-520A, provided that the acts declared unlawful must be done "knowingly," and this knowledge that the transactions involved securities was essential to every act charged.[19] The prosecution's Bill of Particulars specifically charged that Petitioner had "knowledge" that she was dealing in "securities" (App. 74a). There was, however, an evidential shortfall at Petitioner's trial and, when Petitioner offered a jury instruction, consistent with Va. Code §13.1-520(A), requiring the jury to find beyond a reasonable doubt that Petitioner "knew" the notes were securities (App. 79a), the prosecution opposed the instruction and the trial court refused it. Over Petitioner's objection, the trial court instructed the jury instead that "it is *not necessary* that the Commonwealth prove that the defendant *knew* that what

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[18] Va. Code § 18.2-178; *Marine Bank v. Weaver*, *supra*, 455 U.S. 551, at 556 (1972)("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud.")

[19] The acts declared unlawful are: (1) offering or selling an unregistered and non-exempt *security* (§13.1-507); (2) transacting business as an unregistered agent in selling nonexempt *securities* (§13.1-501(b), 504); and (3) *in connection with the sale of any securities*, directly or indirectly employing a scheme to defraud; making false material statements or material omissions; or engaging in transactions, practice or course of business operating as a fraud or deceit upon the purchaser. (§13.1-502). The conspiracy count involves an *agreement* to fraudulently sell *securities*.

she was offering for sale or selling was a security" (App. 98a).

The word "knowingly" in a statute imparts a requirement that an act or omission be undertaken with a "knowledge of the *facts* from which the law presumes a knowledge of the legal consequences arising therefrom." *Gottlieb v. Commonwealth*, 126 Va. 807, 810-11, 101 S.E.2d 872, 873 (1920); *United States v. Illinois Central Railroad Co.*, 303 U.S. 239, 243, 58 S. Ct. 533, 535 (1938). The failure of the trial court to instruct the jury appropriately on the essential element of knowledge rendered meaningless the willfulness instruction provided (App. 97a) that said an act done "willfully" must be done "knowingly," and conflicted with the very next instruction that said "knowledge" was not necessary (App. 98a).[20] In *United States v. Illinois Central Railroad Co.*, 303 U.S. 239, 243, 58 S. Ct. 533, 535 (1938), this Court noted that "'willfully' means something not expressed by 'knowingly,' else both would not be used conjunctively."

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[20] In *Lambert v. Commonwealth*, 6 Va. App. 745, 367 S.E.2d 745 (1988), the Virginia Court of Appeals, quoting *Lynch v. Commonwealth*, 131 Va. 762, 766, 109 S.E. 427, 428 (1921) stated:

> "The word [willful] often denotes an act which is *intentional, knowing or voluntary as distinguished from accidental. But when used in a criminal statute* it generally means an act done with a bad purpose, without justifiable excuse, stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful. *Id.* at 746, emphasis supplied.
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> "When a criminal offense is defined by a willful failure to perform a certain act, it is not sufficient to support a conviction merely to establish that the accused did not do a certain act without establishing circumstances warranting an inference that the failure to act was intentional or by design." (emphasis supplied.) *Id.* at 747.

By the trial court's dual instructions: (1) that every note was a security, and (2) that it was "*not necessary* that the [prosecution] prove that the defendant *knew* that. . ." (App. 98a), the trial court permitted the jury to convict Petitioner of an offense for which the statute gave no notice, and concerning which she was entirely unaware.

Citing this Court's decision in *Screws v. United States*, 325 U.S. 91, 101-102, 65 S.Ct. 1031, 1035-1035 (1945), the Arizona Court of Appeals, in *State v. Tober*, 826 P. 2d 1199, 96 Ariz. Adv. Rep. 91 (Ariz. App. 1991), found a state securities statute that made (1) every note a security, and (2) did not require knowledge that the instrument was a security, to be unconstitutionally vague and violative of due process:

> "[O]ne who is found by a jury to have violated those [securities] laws is held strictly liable without the state having to prove any level of intent. Consequently, a lack of intent to violate the law or good faith belief that the note in question was not a security is not a defense in Arizona, in marked contrast to federal law [citing Title 15 U.S.C. § 78ff (Supp. 1991)(proscribing penalties for "willful violation") and *United States v. Rubinson*, 543 F.2d 951, 959 (2d Cir. 1976), *cert. denied*, 429 U.S. 850 (1976)(in prosecution for conspiracy to sell unregistered securities, government required to prove that defendants knew of or deliberated closed their eyes to, the necessity for registering stock for sale).]"

The Arizona Court therefore reasoned as follows:

> "[W]e are convinced that the Supreme Court's observations in *Screws* are equally valid in this case. Whether a note that is made a security under the statute is in fact a security depends on the circumstances surrounding its issuance. To subject every issuer of a note to potential incar-

ceration in the state prison for up to five years based upon an after-the-fact determination is to place the commercial world at 'risk on a vast uncharted sea.' *Screws*, 325 U.S., at 98, 65 S.Ct., at 1033. That risk is substantially lessened if the note is issued with an intent to circumvent or with blind disregard for the law. One who acts intentionally or knowingly can hardly be heard to say he did not have fair warning that his acts were prohibited by statute."

3. THE VIRGINIA COURTS MAY NOT WITHDRAW AN ELEMENT OF THE CRIMES CHARGED, AND OTHERWISE CONFOUND A JURY BY INSTRUCTING THEM THAT IF THE ACCUSED PARTICIPATED IN ANY WAY IN THE "SALE" OF A "SECURITY," SHE WAS LIABLE FOR CONSPIRACY AND FOR INTENT TO COMMIT SECURITIES FRAUD WHETHER OR NOT SHE CONTEMPLATED SUCH CRIMES BEFOREHAND

The "concert of action" instruction contradicts elements of the crime of conspiracy without providing the jury any means to reconcile differences between the two instructions. The trial court's instruction, "concert of action," reproduced in the margin,[21] blithely ignored the principal element of the crime of conspiracy, "the agreement", making the contradictory and incorrect assertion that a defendant may be answerable for conspiracy "whether such crime was originally contemplated or not." This same accomplice instruction, inappropriate to the crime of conspiracy and no more applicable to the fraud counts, abrogated the intent element necessary to each of the

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[21] Instruction No. 35 stated: "If there is concert of action with the resulting crime one of its incidental probable consequences, then whether such crime was originally contemplated or not, all who participate in any way in bringing it about are equally answerable and bound by the acts of every other person connected with the consummation of such resulting crime." App. 104a.

remaining fraud counts. The concert of action instruction, applied to the fraud counts, allowed the jury to conclude that there was a fraudulent intent *at the time* of the transaction based upon subsequent defaults on the notes.

It has long been established in Virginia that "[t]here can be no conspiracy without an agreement. . .and the Commonwealth must prove beyond a reasonable doubt [as an element of the crime of conspiracy] that an agreement existed." *Floyd v. Commonwealth*, 219 Va. 575, 249 S.E.2d 171, 174 (1978). Nor can a jury be permitted to fudge the difference between conspiracy and the offense of aiding and abetting.[22]

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[22] *Zuniga v. Commonwealth*, 7 Va. App. 523, 527, 375 S.E.2d 381, 384 (Va. App. 1988), cited approvingly an opinion by Circuit Judge Kravitch, *United States v. Bright*, 630 F.2d 804, 813 (5th Cir. 1980), comparing the offense of conspiracy with the offense of aiding and abetting as follows:

> The essence of conspiracy is proof of a conspiratorial agreement while aiding and abetting requires there be a "community of unlawful intent" between the aider and abettor and the principal. While a community of unlawful intent is similar to an agreement, it is not the same. Thus, a defendant may wittingly aid a criminal act and be liable as an aider and abettor, *United States v. Alvarez*, 610 F.2d 1250 (5th Cir. 1980), *rehearing en banc granted* . . . but *not be* liable for conspiracy, which requires *knowledge of and voluntary participation in an agreement* to do an illegal act, *United States v. Suarez*, 608 F.2d 584, 586 (5th Cir. 1979). "As a matter of law, aiding and abetting the commission of a crime and conspiracy to commit that crime are separate and distinct offenses. . . Thus, as a general rule, the double jeopardy clause does not prevent prosecution for both conspiracy and aiding and abetting." *United States v. Nelson*, 599 F.2d 714, 716 (5th Cir. 1979). (Emphasis supplied.)

The Supreme Court of Virginia enunciated this proposition clearly in *Heacock v. Commonwealth*, 228 Va. 397, 407, 323 S.E.2d 90, 95-96 (1984); in *Zuniga, supra*, 375 S.Ed.2d, at 385, this Court explained

The jury in Petitioner's case was instructed, however, there was *no* distinction between conspiracy and aiding and abetting, that it was sufficient if the accused "participated in any way" in some "concert of action" to solicit loans from LaRouche's supporters provided only that some crime (to defraud lenders) was an "*incidental* probable consequence" of such action, albeit accomplished by any "other person [not necessarily a co-conspirator] connected with the consummation of such resulting crime", that is, no matter that the other person was not a party to any agreement beforehand to commit the crime; and, that it did not matter that Petitioner had not agreed beforehand to commit any crime; in fact the instruction goes further than that, it says the crime need not have even been "contemplated" beforehand.

This Court has held that *no* conviction may stand if the jury's verdict could have rested on unconstitutional grounds. *See, e.g., Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931); *Williams v. North Carolina*, 317 U.S 287, 291092, 63 S.Ct. 207, 209-210, 87 L.Ed. 279 (1942); *Cramer v. United States*, 325 U.S. 1, 36, n. 45, 65 S.Ct. 918, 935, n. 45, 89 L.Ed. 1441 (1945); *Yates v. United States*, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed. 2d 1356 (1957); *Leary v. United States*, 395 U.S. 6, 31-32, 89 S.Ct. 1532, 1545-1546, 23 L.Ed.2d 57 (1969); *Bachellar v. Maryland*, 397 U.S. 564, 571, 90 S.Ct. 1312, 1316, 25 L.Ed.2d 570 (1970); *see also Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed. 2d 705 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt").

Heacock's holding as follows:

> Evidence which merely establishes aiding or abet ing in the commission of the distribution offense [the crime at issue there] will not suffice to prove a conspiracy.

Where one jury instruction is unclear, as here, another one can not be chosen because it appears to be correct because "[t]o do so would transfer to the jury the judge's function of measuring the evidence by appropriate legal yardsticks." *Bollenbach v. United States*, 326 U.S. 607, 614, 66 S.Ct. 402, 406, 90 L.Ed. 350 (1946). Nor may it be said, in the context of the overall charge, *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 1206, 108 L.Ed.2d 316 (1990), that anything in the charge could overcome the constitutional inadequacy of the contradictory instructions rendered by the trial court here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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